

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1507

To be argued by
STEVEN M. SCHATZ

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1507

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES C. THWEATT,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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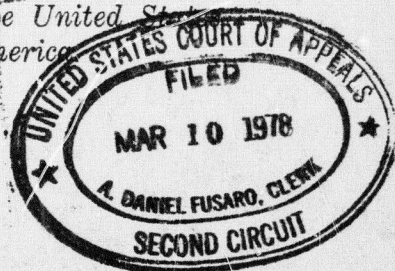


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JAMES C. THWEATT,

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

James C. Thweatt appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on November 22, 1977, following a four-week trial before the Honorable Robert J. Ward, United States District Judge, and a jury.

On July 28, 1977, Indictment 77 Cr. 553, was filed, charging Thweatt with thirty-six counts of making false statements in a matter within the jurisdiction of a department or agency of the United States in violation of Title 18, United States Code, Sections 1001 and 2, and two counts of embezzlement of federal funds, in violation of Title 18, United States Code, Sections 641 and 2.

Counts One through Nineteen of the Indictment charged Thweatt with violating Title 18, United States Code, Section 1001, by grossly inflating, on monthly re-

ports, the actual rent paid by the Legal Propinquity Program of Streetworkers, Inc., and in submitting false documentation to substantiate the rent payments. Count Thirty-seven charged Thweatt with embezzlement of federal rental monies by filtering the federal rental monies into his own personal bank accounts. Counts Twenty through Thirty-six charged false statements concerning the concealment in the monthly reports of various improper expenditures * and Count Thirty-eight charged the embezzlement of federal monies corresponding to the various expenditures set forth in Counts Twenty through Thirty-six.

Trial commenced on September 26, 1977 and concluded on October 20, 1977, when the jury returned a guilty verdict on Counts One through Nineteen, which were the false statement counts pertaining to the rent.**

On November 22, 1977, Judge Ward sentenced Thweatt to concurrent terms of two years' imprisonment on each of the nineteen counts on which he had been found guilty,

* Among the improper expenditures charged in the Indictment, was the use of program funds to purchase two Mercedes-Benz automobiles, one for the defendant and one for another officer of the program, the payment of rent for both the defendant's apartment and the defendant's brother's apartment, and the receipt by Thweatt of large amounts of money.

** On the evening of October 20, 1977, after approximately a day and a half of deliberations, and with the consent of both sides, the Court inquired of the jury whether it could reach a verdict on all counts that evening and that if it could not whether it had reached a unanimous verdict with respect to any count. (Tr. 2435). The jury responded that while it could not reach a unanimous verdict with respect to all counts that evening, it had reached a verdict on Counts One through Nineteen. After the jury returned its partial verdict, the Court, over the Government's objection granted defendant's motion for a mistrial as to the remaining counts. (Tr. 2442-43, 2454). Accordingly, the only issues before this Court are those arising from the false statement counts as they pertain to the rent.

with the defendant to become eligible for parole at such time as the Parole Commission may determine, pursuant to the provisions of Title 18, United States Code, Section 4205(b) (*). Thweatt is at liberty pending this appeal.

Statement of Facts

Government's Case

The Government's case, consisting of twenty-four witnesses, several hundred exhibits, and a number of stipulations, overwhelmingly established that Thweatt had made or caused others to make false statements relating to the rent allegedly paid by the Legal Propinquity Program "Legal Pro" of Streetworker's Inc., a legal services program funded by the Law Enforcement Assistance Administration ("LEAA").

A. The Statutory and Regulatory Framework

In enacting the Omnibus Crime Control and Safe Streets Act of 1968, Congress created LEAA to help coordinate a cooperative effort among the federal Government and the various states and localities to combat crime. (Tr. 360).*

Included among LEAA's functions, was the granting of funds for community based delinquency prevention and correction programs, such as the Legal Propinquity Program. (Tr. 295-96, 371). In New York State, LEAA awarded bloc grants to the New York State Division of

* The abbreviation "Tr." refers to the trial transcript; "GX" refers to Government Exhibits; "DX" refers to defendant Thweatt's Exhibits; and "CT.EX." refers to the Court's Exhibits. The abbreviations "Br." and "A", respectively, refer to Thweatt's Brief and Appendix.

Criminal Justice Services ("DCJS"), which, in turn, submitted various reports to LEAA, including a Comprehensive Crime Control Plan, initially to secure federal funds, and periodic reports to document the uses to which the funds had been applied. (Tr. 296, 361; GX 70-71). DCJS also acted as a link between LEAA and local administering agencies, including New York City's Criminal Justice Coordinating Council (CJCC"), which in turn supervised the private implementing group, the "sub-grantee" or "contractor" (Tr. 303, 362). The Hollow Organization and later Streetworkers, Inc., were the contractors who operated the Legal Propinquity or "Legal Pro" Program, and were supervised by the CJCC. Thus, the LEAA grant program consisted of a reporting chain emanating from the contractor up through CJCC and DCJS to LEAA, and a monetary chain with money clearly demarcated as federal funds, being passed through the State and City governments down to the ultimate recipient of the grants. (Tr. 75-76, 361-64, 367-72; 378-80).

To insure that federal money was disbursed properly, monthly reports were forwarded to both CJCC and DCJS, and required the contractor to detail, according to specific categories, funds actually expended. (Tr. 78-9, 303, 364). Rent was one such specific category. (Tr. 78-9; GX 1-20). An additional requirement was that the monthly reports contain written documentation, in the form of cancelled checks or receipts, which substantiated the claimed expenditures. (Tr. 78-9; GX 1-20). These monthly reports formed the basis for both the reimbursement of expenditures of the contractors and the reports which DCJS forwarded to LEAA to secure federal funds. (Tr. 318-20, 323-24).*

* Indeed, some of the reports submitted to LEAA by DCJS are so detailed that they itemize the amount of federal money actually expended by specific programs, including moneys expended by the Legal Pro Program. (Tr. 315-17; GX 101, 102, 103).

B. The Grant Award—Legal Propinquity Program

In 1971, the Hollow Organization, a private not-for-profit corporation, submitted a proposal to CJCC for federal financing of the Legal Propinquity Program, which provided youths arrested for relatively minor crimes with counselling. (Tr. 82-7). By February 29, 1972, Thweatt as director of Legal Pro approved the terms of the proposed agreement. (Tr. 104; GX 27). The initial grant award, which took effect in March or April of 1972, awarded over \$71,000 of federal funds to the Legal Pro Program. (Tr. 105-08; GX 28).*

At the time that the grant award became effective, Thweatt met with Rudolph Clarence, the Chief Fiscal Officer of CJCC. Clarence told Thweatt that all federal expenditures, including rent, had to be substantiated by documentation, that modifications of the budget could only be secured by written approval from the agency, that actual expenditures rather than authorized expenditures had to be reported, and that reimbursement with federal funds would be made only for actual expenditures. (Tr. 121-24, 279-80). Thweatt assured Clarence that all of these conditions would be complied with. (Tr. 124-5).

Beginning in August 1972,** for the period May 1972, and continuing for the next twenty months through

* In approximately August and September 1973, Thweatt on behalf of Legal Pro applied for and secured an increase of federal funds of \$15,338 for a total of over \$86,000 in federal funds. (Tr. 189-90, 306; GX 33). In addition, beginning in June 1973, over the course of the next twelve months Thweatt, on behalf of Legal Pro, submitted applications for refunding requesting additional federal funds in excess of \$180,000. (Tr. 177-80; GX 36-38).

** In approximately July, 1972, following the demise of the Hollow Organization, Streetworkers Inc., which became a separate and distinct not-for-profit corporation, took over the administration of Legal Pro. (Tr. 444; GX 566). Thweatt continued as the program's director and became vice-president and treasurer of Streetworkers. (Tr. 430).

February 1974, Thweatt submitted and caused others to submit monthly reports which purported to set forth actual rent expenditures. (GX 1-20). As director of the program, Thweatt certified the accuracy of each report or caused others to do so on his behalf and with his approval. (Tr. 563; GX 1-20).

C. The Rent Scheme

The full scope and extent of Thweatt's culpability for the crimes charged in Counts 1-19, can best be discerned by a comparison of the actual rent at the Legal Pro storefront located at 1686 Madison Avenue, and the rent which was reported on the monthly reports submitted to CJCC and DCJS. The evidence at trial demonstrated that Thweatt systematically submitted and caused others to submit monthly reports which overstated the rent for the Legal Pro storefront. At no time was the actual rent in excess of \$150, yet the reports initially reflected rent of \$325 a month and later \$800 a month. The only rent actually paid during the twenty month period charged in the Indictment totalled \$500 or at most four months rent. Moreover, to substantiate the fraudulently claimed rental expenditures, Thweatt prepared false documentation in the form of Hollow organization checks to Streetworkers purporting to be rental checks and later rent receipts from a shell corporation, One-Twenty-One Management Company, "121 Management", a corporation in which his sister was the principal, and which falsely purported to be the management agent for the Legal Pro storefront. Finally, the evidence established that over \$22,000 of the \$27,775 of Streetworkers "rent" funds paid over to 121 Management were deposited into Thweatt's personal bank accounts.

1. The Actual Rent Paid by Legal Pro of Streetworker's Inc.

From 1971 through the end of 1973, the building used by Legal Pro was owned by Mary Chan, and managed by a series of agents. (Tr. 872, 929, 933). Through April 1972, the building was managed by Raphael Brooks, with the rent for the storefront set at \$150 a month. (Tr. 450-51, 878, 1047; GX 387). Despite the fact that the monthly reports claimed that the rent was \$325 per month and later \$800 per month, the evidence clearly established that the actual rent was never greater than \$150 a month. The building's owner and each of her agents testified that at no time was the rent \$325 or \$800.*

Indeed the evidence further demonstrated that Thweatt knew the rent was \$150 per month. Beginning in approximately April 1972, and for the next six months Mrs. Chan turned over the management of the building to her lawyer George Ziegler, who spoke to Thweatt on two occasions. (Tr. 874-5, 1047-8). In late May 1972, Thweatt telephoned Ziegler and told him that the rent for the Legal Pro storefront would be paid by a new group. (Tr. 890). By letter dated June 1, 1972, Thweatt confirmed the prior telephone conversation. (GX 161). In the first half of June, Thweatt visited Ziegler at his office and requested a reduction in the rent to \$125. (Tr. 891). Although Ziegler objected to a rent reduction, he did agree to raise the matter with Mary Chan on condition that some rental payments be made. (Tr. 891-2). In a telltale letter to Ziegler dated June 26, 1972, Thweatt enclosed a check for \$250, stating that "this amount is for

* Defense counsel conceded "there is nothing in the record that shows that the rent was anything other than the \$150 at 1686 Madison Avenue." (Tr. 2290).

two months rent at 1686 Madison Ave.... [and that] the enclosed \$250.00 represents the rent for May (125.00) and June (125.00)." (GX 162).^{*} In mid-August 1972, Thweatt forwarded to Ziegler another \$250 check representing the rent for July and August. (Tr. 885-86, 895; GX 160B, 162A). These payments totalling \$500 were not only the sole rental payments received by Ziegler, but also represented the only rental payments made during the entire twenty-month period charged in the Indictment. (Tr. 875; GX 159).

In late September 1972, Ziegler turned the management of 1686 Madison Avenue back over to Raphael Brooks. (Tr. 904, 1047; GX 163B). From October 1972 through December 1973, neither Raphael Brooks, nor his successor, Harold Perlson received any rental payments for the Legal Pro storefront. (Tr. 1053; GX 167A, 167B). Indeed, the situation was sufficiently egregious, that Brooks counselled Mary Chan to take appropriate legal action. (Tr. 1071).

2. The False Reports Inflating The Rental Payments

Beginning with the second monthly report filed in August 1972, covering expenses for the period May and June 1972, through report number 20, filed in February 1974, Thweatt submitted and caused to be submitted monthly reports which overstated the actual rent at the Legal Pro storefront; in addition, the claimed rental expenditures were supported by false and forged documentation prepared by Thweatt. (Tr. 1549-52; GX 1-20).

^{*} GX 162, the Thweatt to Ziegler letter dated 6/26/72, as well as numerous other important documents, were identified by Joseph McNally, a handwriting expert, as having been written in the defendant's hand. (Tr. 1557).

Through July 1973, the monthly reports claimed rent expenditures of \$325 per month and beginning in August 1973, the reports claimed rent expenditures for the Legal Pro storefront of \$800 per month. (*Id.*).

Thweatt went to great pains to document these falsely reported rental payments. In order to support the first six months of claimed rental expenditures, Thweatt signed and prepared a series of Hollow Organization checks, payable to Streetworkers, each of which bore a notation indicating that it represented the "rent" for the "Legal Pro" storefront at 1686 Madison.* (Tr. 1551; GX 2-5).

In order to justify Hollow Organization checks made payable to Streetworkers, Inc., Thweatt manufactured a letter to give CJCC the impression that Streetworkers, Inc. had been hired by the owner of 1686 Madison Avenue to manage the building. Thus, in June or July 1972 Thweatt sent Rudy Clarence of CJCC a letter, written in his own hand, which falsely stated that:

"Streetworkers, Inc. has been hired by the owner of the building to serve as the building's managers until the buildings are torn down in December of this year.

I will be glad to include our cancelled checks as proof of our rent payment in our future vouchers."
(Tr. 146, 1557; GX 168).* (Emphasis Supplied)

* Each of the checks, which checks purported to represent payment of six months rent at \$325 per month, bore notations such as that appearing on GX 2X which noted "May & July rent, \$650, 1686 Madison Legal Pro." The evidence at trial not only established that these checks did not represent the true rent, but in actuality, were part of an elaborate scheme of intra-company account transfers in which funds were passed back and forth through numerous inter-related corporate accounts. (Tr. 1664-69; GX 702).

The letter's representation that "Streetworkers, Inc., had been hired by the owner of the building to serve as the building's managers" was blatantly false because several witnesses, including the owner, Mary Chan, testified that neither the owner nor any of her agents authorized Streetworkers, the Hollow Organization, Legal Pro, 121 Management or anyone associated with those entities, to manage the premises or collect the rent. (Tr. 875-76, 932-34, 1056, 1079).

Beginning with monthly report number 7, Thweatt forged and submitted with the monthly reports a series of "rent receipts", which purported to represent the receipt of rent by 121 Management and individuals associated with 121 Management including the defendant's sister, Iris Rucker, his cousin, Walter Watson, and an individual by the name of A. Bragg. (Tr. 1551-52; GX 7X-20X).^{*} In order to give CJCC the impression that 121 Management now was responsible for the management of the storefront housing Legal Pro, another fraudulent letter was sent to CJCC. This letter was sent to CJCC in September or October 1972 and falsely purported that it was written by Mary Chan, the building's owner, and sent to Iris Rucker, Thweatt's sister. (Tr. 154). The "Mary Chan letter" provided that:

"As per our last discussion I would like for you and your Management Co. to start managing my property located at 1686 Madison Ave. starting Oct. 2, 1972." (GX 169).

^{*} Joseph McNally, the handwriting expert, positively identified Thweatt as writing all but two of the forged and fraudulent rent receipts. (Tr. 1151-52; GX 7X-10X, 12X-15X, 17X-20X).

Of course, this letter was false, and Thweatt who later adopted the letter in dealing with an auditor hired by CJCC, knew it was false.*

Beginning with the report covering August 1973, Thweatt escalated the amount he fraudulently claimed was paid by Legal Pro for rent. Thweatt now claimed rental expenses of \$800 per month and prepared rent receipts which not only reflected the increased rent but also depicted a purported move by Legal Pro to 1680 Madison Avenue, although the evidence was uncontradicted that no such move ever occurred. (Tr. 562, 567, 1346-47, 1352; GX 15-20, 15X-20X).** Indeed, Thweatt had laid a foundation for this claim of increased rental expense, in June 1973, by signing on behalf of Legal Pro an applica-

* Notwithstanding defense efforts to assert that the letter was legitimate, its falsity was overwhelmingly established by the evidence adduced at trial. First, Chan testified that her only agents were Brooks, Ziegler and Perlson and that she did not write the letter. (Tr. 933-35). Second, the handwriting expert testified that although he could not positively identify the signatory of the letter, he could state that it was not Mary Chan. (Tr. 1558). Third, the letter stated that Mary Chan's address was on Janet Place in Jackson Point, Ontario, Canada, whereas Mrs. Chan testified she lived for the past twenty years on Dalton Road and further that she never even heard of "Janet Place." (Tr. 928-29, 936). Fourth, Thweatt received over \$22,000 of the over \$27,000 of supposed rent money tendered to 121 Management. (Tr. 1670; GX 703, 703A, B and C). Finally, during the course of a fraud audit, Thweatt submitted to Charles Gomez, a certified public accountant hired by CJCC, copies of both the Chan letter and the equally fraudulent rent receipts which had been submitted to substantiate the claimed rental expenditures. (Tr. 196-97, 1409-10; GX 169).

In light of the foregoing, the jury could reasonably infer that Thweatt either authored and signed the letter himself or that someone did so at his behest.

** The evidence also established that despite the poor conditions existing at the storefront offices at 1686 Madison Avenue, no renovations were performed. (Tr. 610-11, 1352).

tion for refunding seeking nearly \$300,000 in additional federal funds, which application stated that beginning in July 1973 the program would move to expanded premises at 1680 Madison Avenue. (Tr. 1555; GX 36). Furthermore, in August 1973, Thweatt submitted an application for short-term refinancing which called for rental reimbursement of \$800 per month, and further claiming that "the budget for three months is based on present level of expenditure." (Tr. 1555; GX 33).

3. LEAA Funds Traced To Thweatt's Bank Accounts

Thweatt took great advantage of the inflated rental claims. Of the \$27,775 which had been deposited into the various 121 Management Company bank accounts, \$22,275 was ultimately deposited into Thweatt's private bank accounts. (Tr. 1670, 1674-77; GX 703, 703A-C). Over \$8,000 of this rent-money was directly traceable as federal rental reimbursement funds for the Legal Pro storefront. (GX 235-244).*

* Rent was clearly delineated a "federal" category. (GX 2-20). The remainder of the twenty-two thousand dollars traced into Thweatt's bank accounts represented the proceeds of a similar rent scheme perpetrated by Thweatt, and Streetworkers, on New York City's Addiction Services Agency. (GX 246-257). The gravamen of the scheme perpetrated on ASA is that Streetworkers claimed reimbursement of rent for premises located at 161 East 121 Street in periodic reports allegedly paid to 121 Management dating back to November 1972 even though 121 Management was not even incorporated until April of 1973. (Tr. 957-58, 1142-47; GX 172, 476AA-476LL). Moreover, as of March 1973, Streetworkers took title to the building, and thus any rent payments made thereafter would have been to itself. (Tr. 1094, 1099). At no time did the true owner of the premises receive any rent. (Tr. 1951). As was the case with the money derived from LEAA, the vast bulk of the rental money was laundered through 121 Management into Thweatt's personal bank accounts (Tr. 1674-77; GX 703 B & C). Indeed, the passage of rental reimbursement monies

[Footnote continued on following page]

Thweatt secured these funds by either preparing himself, or having Walter Watson do so, a Streetworkers' check made payable to 121 Management Co., with Thweatt often endorsing the check. (Tr. 576-79, 1562-65; GX 235-244, 246-257). Thweatt would then draw checks transferring funds from the 121 Management accounts to his own. (Tr. 1565-67; GX 260-266).*

4. Thweatt's Cover-up of Fraudulent Rent Scheme

The last peg of the Government's case evidenced the manner in which Thweatt orchestrated Streetworkers' cover-up of the rent scheme. The cover-up included: 1) Thweatt's supplying copies of the forged Mary Chan letter, and the fictitious rent receipts to Charles Gomez, an accountant conducting an audit of the Legal Pro program (Tr. 1409-10); ** 2) Thweatt's false testimony

from governmental agencies to Thweatt's personal bank accounts represented virtually the only activity in the 121 Management bank accounts (GX 207). Thus, in connection with both the LEAA and ASA funded programs, Thweatt on behalf of Streetworkers, submitted false vouchers for rent and turned over the resulting monies to the shell corporation, 121 Management, through which he filtered the funds into his personal bank accounts. Obviously, this evidence was highly probative, not only on the issue of Thweatt's intent, common scheme and plan but also to show the sham nature of 121 Management. See, Fed. R. Evidence, Rule 404(b).

* Watson testified not only to the direct passing of checks to Thweatt, but also the manner in which Thweatt supplied the phony rent receipts. (Tr. 555-56, 576-79, 620).

** Thweatt also gave Gomez a copy of a forged document, purporting to be from Iris Rucker, which falsely asserted that "the property located at 1686 Madison Avenue has been under the management of the 121 Management Co. since Oct. of 1972. ... [and further provided that] "[A]ll arrangements and business transactions between Street Workers Inc. and the 121 Management Co. have been arms length transactions." (Tr. 1428-29; GX 170).

before the New York City Department of Investigation where he, among other false testimony, concealed his relationship with Iris Rucker, his sister and the titular president of 121 Management (GX 640); * 3) Thweatt's disguising of his handwriting when providing exemplars to an agent of the FBI. (Tr. 1605; GX 600); 4) Thweatt's attempt to obstruct the grand jury investigation by suggesting to Watson that even if Watson were granted immunity, he need not "remember" certain things. (Tr. 701-02).

The Defense Case

Thweatt's case consisted of ten witnesses, who could be described primarily as character witnesses, and six substantive witnesses, only four of whom testified concerning the crimes charged in Counts 1-19.** Each peg of the defense case backfired.

The so-called character witnesses all admitted on cross-examination to be ignorant of the instant facts. One witness admitted to having a profitable insurance business relationship with Streetworkers including Streetworkers paying the insurance premium on one of the Mercedes-Benz automobiles charged in the Indictment. (Tr. 1824-25; GX 900).

The defendant also called Sidney Mann, who has been twice convicted and incarcerated on narcotics charges and who was an official of Streetworkers, in order to establish the proffered defense that CJCC representatives authorized Streetworkers to use excess rent money for renova-

* The case was originally investigated by the Department of Investigation which referred the matter to the United States Attorney's Office, in light of the fact that the defrauded party was LEAA, an arm of the United States Department of Justice.

** Two of the substantive witnesses pertaining to the rent counts were of a minor nature and provided little relevant testimony.

tions. (Tr. 1857, 1897).^{*} On cross-examination, Mann's testimony redounded to Thweatt's detriment when it was established (1) that he falsely had stated CJCC had no money for renovations within the framework of the contract, when in fact \$4000 had been specifically allocated for such purposes in the grant award (Tr. 1887-88, 1926-28; GX 28, 30); (2) that any statements by CJCC officials to "maximize the rent" were made in the context of Streetworkers moving to a new and presumably more expensive location (Tr. 1930-A); and (3) that no one at CJCC had authorized the submission of phony rent receipts. (Tr. 1930A, 1933-34).

Iris Elaine Thweatt Rucker Dougherty, the defendant's sister, whose testimony eroded the credibility of the defense even further, testified that she was an officer of 121 Management, and that she specifically remembered receiving the Mary Chan letter in the mail five years earlier. (Tr. 2042-43). On cross-examination, she was compelled to admit: (1) concealing in the grand jury the fact that she was the defendant's sister and that Thweatt was her maiden name, (Tr. 2052-53) and (2) never having a conversation with Mary Chan although the Mary Chan letter referred to a prior conversation. (Tr. 2057; GX 169). She further testified that Mary Chan owned 161 East 121st Street—a building which the defense contended was managed by Iris Rucker's company and which was the site of the Streetworkers' ASA program. (Tr. 2060). The evidence was uncontradicted that Anna B. Ricca had been the owner of 161 E. 121st Street premises and Mary Chan had no connection whatsoever with those premises. (Tr. 1091).

^{*} This defense was presented in the face of overwhelming evidence that no renovation work was performed at the Legal Pro storefront. (Tr. 541, 562, 567, 1346-47, 1350-52).

ARGUMENT

POINT I

The District Court's Supplemental Instructions to the Jury Were Entirely Proper.

Thweatt contends that Judge Ward committed reversible error in declining to repeat his character evidence charge in response to two jury notes received during the jury's deliberations. Judge Ward's decision not to reiterate the character evidence charge was entirely proper, and his supplemental instructions were responsive to the jury's notes and eminently fair. Accordingly, Thweatt's claim is without merit.

At approximately 10 A.M. on October 20, after approximately a half day of deliberations, the jury submitted a note requesting a copy of the Court's charge. (Tr. 2388, Ct. Ex. 5). With the consent of both sides, the Court advised the jury that

"In the event you want the entire charge, beginning to end, read back to you, we are ready, willing and able to do it.

But in my discussion with counsel, we thought possibly you might want one or another portion of the charge read to you." (Tr. 2390) (Emphasis Supplied).

Reiterating that he did not want to "limit" the jury and that he could read the entire charge, Judge Ward requested that the jury send back another note specifying the portion or portions of the charge in which it was interested. (Id.).

At approximately 11:10 A.M., the jury sent back a clarifying note:

"Elements of the charge relating to Counts 1-19. Any part of the charge relating to the jury's responsibility in considering the defendant's intent (relating to Counts 1-19)." (Tr. 2391; Ct. Ex. 6).

After soliciting the views of counsel, the Court ruled on the portions of the charge he would reread, denying one request from each side to include an additional portion of the charge. (Tr. 2396). After reviewing his character evidence charge,* Judge Ward denied defendant's request for its inclusion, ruling that it was not responsive to the jury's note. Rather than exhibiting a limited view toward the possible future inclusion of the character evidence instruction, the Court stated that if the jury should ask about reasonable doubt then the Court would reiterate its character witness charge. (Tr. 2395-96). Evidencing the even-handedness which marked his conduct throughout the trial, Judge Ward further ruled that he would deny as unresponsive the Government's request that he recharge on the purpose of 18 U.S.C. § 1001, even though that charge specifically referred to the issue of intent. (2397; Govt. Req. 6).**

Before responding to the jury's note, Judge Ward was fastidious in inviting the jury to request additional portions of the charge. He informed the jury:

* The Court's charge on character evidence was impeccable and included language that "[e]vidence of good character may in itself create a reasonable doubt where without such evidence no reasonable doubt would have existed." (Tr. 2357).

** The Court also overruled defendant's objection to the inclusion of the Court's instruction on similar acts and consciousness of guilt and false exculpatory statements, since these instructions clearly went to the issue of intent. (Tr. 2394-95). Indeed trial counsel conceded that the charges in question, "in essence, are evidentiary matters which talk about how the question of intent should be decided under certain circumstances." (Tr. 2394).

"I have conferred with counsel and I have indicated to counsel portions of the charge which I believe that you want. *I can fairly say that both counsel indicated there were additional portions of the charge which were responsive to your note. I have made the initial determination.* We are going to read what I think you want, but I am issuing an invitation if I have omitted something that you heard or think you heard, then I solicit another note if you feel it appropriate, because in the attempt to focus in on your thinking, I selected the portions I thought to be appropriate, and I suppose the only way to satisfy everyone totally and completely is to read the whole charge, and you came back with a request for a portion. So I do want to indicate to you that if in my trying to answer your note I omitted something that someone wanted to hear on any subject, you go back in there, send me another note, and we will renew our efforts to comply with whatever you request." (Tr. 2398-99). (Emphasis Supplied).

Notwithstanding Thweatt's misleading description that the Court "re-charged instead only on prosecution-oriented matters," the Court's response was well-balanced and fair. (Tr. 2400-12; Br. 16). Indeed, the very instructions which Thweatt now describes as so prejudicial were part of the Court's initial charge to which diligent trial counsel took no exception. (Tr. 2366). In responding to the jury's note the District Court was scrupulously fair: He emphasized the concept of reasonable doubt, referring to it on at least four separate occasions (Tr. 2400, 2402, 2406, 2409); he referred to intent not merely as unlawfully and willfully but rather in terms of "knowledge, and wilfulness and criminal intent", and "knowledge, guilty knowledge, intent to defraud, criminal intent," thereby imposing, if anything, a more rigorous standard of intent than that dictated by the statute (Tr. 2404); further-

more, he scrupulously marshalled defense contentions, including, for example, that "121 Management was a legitimate business venture in which Iris Rucker has invested \$4000 of her own money." (Tr. 2412). These instructions, repeated in response to the jury's notes were clearly favorable to the defendant, and thus Thweatt's claim that the supplemental instructions were not balanced or were only prosecution-oriented must be rejected.

Finally, after re-reading the applicable portions of his charge, Judge Ward repeated his invitation to read additional portions of the charge—"in the event that any of you have not heard what you wanted to hear, to let me know." (Tr. 2412-13).

At approximately 3:10, the jury sent another note to the Court inquiring:

"If a person has a very good intent and purpose, does this intent and purpose make lying to a government agency not a crime? Does this very good intent and purpose mean that this individual had no criminal intent when he or she lied to a government agency?" (Tr. 2416; CT. Ex. 7).

In response to the note, the District Court ruled that he would re-read the charge, given by Judge Weinfeld in *United States v. Corr.** The Court specifically denied the Government's suggestion to confine his response to the language "the law recognizes no excuses or justifications for a false, fictitious, or fraudulent statement wilfully and intentionally made," ruling, rather, in an effort to be fair, that he would read the entire charge, "because if I just read the last sentence, it is probably much stronger

* *United States v. Corr.*, 75 Cr. 803 and 75 Cr. 1059, (Tr. 541-16) *aff'd*, 543 F.2d 1042 (1976).

against the position you take [the defense]" (Tr. 2420, 2421).*

After responding to the note, the Court again solicited further notes from the jury, if it had not fully answered their inquiry. (Tr. 2422-23).

It is settled law that the extent, character and necessity of supplemental jury instructions are matters within the sound discretion of the trial judge. *United States v. Gentile*, 525 F.2d 252, 260-61, (2d Cir. 1975), *cert. denied*, 425 U.S. 903 (1976); *United States v. McCarthy*, 473 F.2d 300, 307-8 (2d Cir. 1972); *United States v. Miller*, 546 F.2d 320, 324 (9th Cir. 1976); See *United States v. Tyers*, 487 F.2d 828, 832 (2d Cir. 1973), *cert. denied*, 416 U.S. 971 (197); *United States v. Rodriguez*, 545 F.2d 829, 832 (2d Cir. 1976), *cert. denied*, 46 U.S.L.W. 3215 (Oct. 4, 1977); *United States v. Rosenberg*, 195 F.2d 583, 598-99 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952). In responding to requests for supplemental instructions, the court need not go beyond the specific inquiry, although it is within its discretion to do so. *United States v. Tyers*, *sup.a*; *United States v. McCarthy*, *supra*; *United States v. Gentile*, *supra*; ABA Project on Minimal Standards for Criminal Justice, *Trial by Jury*, § 5.3(b) (Approved Draft, 1968) ("ABA Jury Standards"). Indeed, this Court has held, in the context of a trial judge's response to a jury's request for additional evidence, that the Judge's discretion is so broad that

[R]eversal for submitting material in addition to that requested is required only where the submission might indicate, or be fairly taken by the jury to indicate, prejudice of the judge against the

* A simple negative response would have been an accurate response to the jury's inquiry; however, Judge Ward chose to blunt his response in order to be fair to the defendant. (Tr. 2420)

defendant, as e.g., when the judge insisted on submitting evidence favorable to the prosecution that was in no way germane to the request, or when it leads to a biasing of the record." *United States v. Gentile*, *supra*, 525 F.2d at 261.

The mere fact that the jury's questions naturally elicit a response favorable to the Government does not render nugatory this basic proposition. See *United States v. Tyers*, *supra*.

Therefore, under the applicable standards, Judge Ward acted entirely properly and certainly within the bounds of his discretion, in his response to Court Exhibit 6, the jury's note pertaining to intent. The District Court solicited the views of counsel, denied requests from each side to include certain charges, invited the jury to request additional matter, gave an emphatically fair instruction, and then cautioned the jury for a second time that if it wished, the Court was prepared to instruct them further.

To have charged the jury on character evidence would have gone far beyond the specific inquiry of the jury. A review of applicable authority and the various approved "character evidence" charges, makes clear that such evidence is, as Judge Ward correctly found, pertinent to the issue of reasonable doubt. See e.g., *United States v. Fayette*, 388 F.2d 728, 737 (2d Cir. 1968); *United States v. Cramer*, 447 F.2d 210, 219 (2d Cir. 1971), *cert. denied*, 404 U.S. 1024 (1972); *United States v. Minieri*, 303 F.2d 550-555 (2d Cir.), *cert. denied*, 371 U.S. 847 (1962); *United States v. Lowenthal*, 224 F.2d 248 (2d Cir. 1955). Even assuming *arguendo*, that there exists a relationship between character evidence and intent—a contention we

dispute—any such relevance can hardly be described as anything but remote.*

Similarly, Judge Ward's response to Court Exhibit 7, was temperate and more favorable to the defendant than that called for by the inquiry, since a simple "no" to each question would have been accurate. Rather, the court chose to blunt its response by quoting the cautious language employed by Judge Weinfeld in the *Corr* case. (Tr. 2420, 2421). The inclusion of the character evidence charge would have been unresponsive to the jury's inquiry and would have provided them insufficient guidance.

Under these circumstances, it strains credulity even to suggest that Judge Ward's supplemental instructions

*Thweatt relies on a series of Fifth Circuit opinions which he argues support his position that re-reading of the character evidence instruction was "required to preserve a semblance of balance" even if such an instruction was not responsive to the jury's note. (Br. 20). The Fifth Circuit cases relied on by Thweatt differ substantially from the instant case in at least two fundamental respects: (1) in each instance the charge given conveyed an erroneous impression to the jury and (2) in each instance the charge given was grossly imbalanced. See *United States v. Carter*, 491 F.2d 625 (5th Cir. 1974); *United States v. Sutherland*, 428 F.2d 1152 (5th Cir. 1970), *cert. denied*, 409 U.S. 1078 (1972); *Bland v. United States*, 299 F.2d 105 (5th Cir. 1962); *Perez v. United States*, 297 F.2d 12 (5th Cir. 1961).

The supplemental instruction given by Judge Ward met the Fifth Circuit standard of balance and fairness. Moreover, the Fifth Circuit cases are inconsistent with the ABA Jury Standards, § 5.3(b) that "[t]he court need not give additional instructions beyond those specifically requested by the jury . . ." and the commentary to the ABA standards further observes that only the Fifth Circuit has gone beyond what is permitted by § 5.3. Finally, the Fifth Circuit rule has been rejected impliedly by this Court. *United States v. Tyers*, *supra*, 487 F.2d at 832; *United States v. McCarthy*, *supra*, 473 F.2d at 307-08; *United States v. Rosenberg*, *supra*, 195 F.2d at 598-99. See also, *United States v. Gentile*, *supra*, 525 F.2d at 261.

warranted reversal because it "indicated prejudice of the judge against the defendant," or that it led "to a biasing of the record." *United States v. Gentile*, *supra*, 525 F.2d at 261. The portions of the charge reread by Judge Ward were responsive to the jury's note, legally accurate, fair, and balanced.

Even assuming *arguendo* that the Court in its discretion should have re-read the character evidence charge, any such error was harmless beyond any doubt. See *Chapman v. California*, 386 U.S. 18 (1967); *United Berenguer*, 562 F.2d 206, 211 (2d Cir. 1977). Judge Ward gave Thweatt great latitude by permitting him to present ten character witnesses. See *United States v. Zane*, 495 F.2d 683 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974) (no error in limiting number of character witnesses to five); *United States v. Kahan*, 479 F.2d 290 (2d Cir. 1973), *rev'd on other grounds*, 415 U.S. 239 (1974); *United States v. Jacobs*, 451 F.2d 530 (5th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972) (no abuse in limiting character witnesses to three); *Petersen v. United States*, 268 F.2d 37 (10th Cir. 1959) ("harsh", but not reversible, to limit character witness to one). Moreover, here the District Court, in its initial charge, gave an impeccable character evidence instruction—an instruction far more perfect than those which this Court found to be harmless error. See *United States v. Cramer*, *supra*; *United States v. Minieri*, *supra*.* When the judge's original and supplemental instructions are viewed as a whole, the jury received more than adequate guidance. Cf. *United States v. Martinez-Carcano*, 557 F.2d 966, 969 (2d Cir. 1977). Finally, notwithstanding Thweatt's

* Indeed, this Court has recently affirmed a conviction in which only two character witnesses were called and in which the District Court failed to give any charge on character evidence. *United States v. Lamont*, 565 F.2d 212, 225-26 (2d Cir. 1977), *cert. denied*, March, 1978, 46 U.S.L.W.—(March 1978).

sanguine view that the case was "close" (Br. 17), the evidence of guilt was overwhelming and included forged documents, the diversion of thousands of dollars to Thweatt, and devastatingly false exculpatory statements.*

POINT II

The Admission of Government Exhibit 56 Was Proper.

Thweatt claims that the admission into evidence of Government Exhibit 56 constituted reversible error because a proper foundation had not been established. This claim is without merit.

Government Exhibit 56, a letter from Henry S. Ruth, Jr., the then Director of CJCC to Harold Oosdyk, the then President of the Hollow Organization, stated that various regulations had to be followed in the operation of the Legal Propinquity Program. The letter was largely duplicative of the material covered by Rudy Clarence, chief fiscal officer of CJCC, in his talk with Thweatt. (Tr. 121-24, 279-80; GX 56; A. at p. D).

By the time the document was admitted into evidence, it had been established that Thweatt was the Director of

* Contrary to Thweatt's claims that character evidence "as it affected the question of criminal intent" was the "linchpin of the defense," in fact that defense as evidenced by Mann's and Rucker's testimony, discussed at pp. 14-15, *supra*, was largely that CJCC authorized the rent expenditures and that 121 Management was the true agent for 1686 Madison Avenue.

the Legal Propinquity Program, that as such, Thweatt had approved the terms of the proposed contract, had met with Clarence of the CJCC and had discussed various reporting requirements. (Tr. 82-7, 104, 121-25, 270-80; GX 27). Oosdyk, through whom the document was offered,* testified that Thweatt was the fiscal administrator of the program, the chief fiscal officer of Legal Propinquity, and that as of May, 1972, the date of the letter, Thweatt was the person with "primary responsibility for the CJCC grant". (Tr. 429-34, 464, 475). With respect to GX 56, Oosdyk testified that although he had no specific recollection, he was "sure" that he "probably" showed the document to Thweatt, and that as of May, 1972, it was his practice of giving correspondence pertaining to the CJCC grant to Thweatt. (Tr. 468, 472). He further testified that his practice was to turn over to Thweatt documents pertaining to the grant, rather than retain such materials. (Tr. 472). While Oosdyk did on occasion turn materials over to other persons, it would be with the direction to pass the items to Thweatt. (Tr. 474).** Under these circumstances, and after permitting defense counsel extensive voir dire, Judge Ward was amply justified in finding, "there is a sufficient foundation for the Court to conclude that the letter was in fact turned over to Mr. Thweatt." (Tr. 478).

Questions relating to the admissibility of evidence, are matters within the sound discretion of the District Court, the exercise of which may be overturned on appeal

* Oosdyk, a close friend of the defendant, was called as a hostile witness, necessitating the Government to repeatedly impeach his testimony with prior inconsistent grand jury testimony. (Tr. 420-22, 432-34, 439, 443).

** It is significant that defense counsel chose not to inquire of either Carl Hart or Sidney Mann both of whom testified and were associated with the defendant, whether they had received GX 56.

solely upon a showing of clear abuse of discretion. See *Hamling v. United States*, 418 U.S. 87, 124-25 (1974); *United States v. Robinson*, 560 F.2d 507 (2d Cir. 1977) (en banc), *cert. denied*, Feb. 27, 1978, 46 U.S.L.W. (March 1978); *United States v. Corr*, *supra*, 543 F.2d at 1051; *United States v. King*, 560 F.2d 122, 133 (2d Cir.), *cert. denied*, 46 U.S.L.W. 3293 (Nov. 1, 1977).^{*} Here strong circumstantial evidence of both Thweatt's position in the program and Oosdyk's routine business practice pointed to the receipt of the document by Thweatt. (Fed. R. Evid., Rule 406). Under these circumstances, the admission of the document into evidence was well within Judge Ward's discretion.^{**}

Contrary to the position advanced by Thweatt in his brief, Government Exhibit 56 was hardly a devastating piece of evidence, and its admission certainly did not deprive Thweatt of a fair trial. Rudy Clarence of CJCC had already testified to advising Thweatt of various reporting requirements and thus the document was largely corroborative of his testimony. (Tr. 121-24). More to the point, Thweatt was convicted of Counts 1-19—Counts which charged the making of false statements concerning the rent and preparing and submitting false documentation pertaining to the rent. It does not require extensive knowledge of the intricacies of the reporting requirements

^{*} Thweatt inexplicably relies on *Gila Valley, Globe & Northern Ry. Co. v. Hall*, 232 U.S. 94, 102-03 (1914), a railroad negligence case affirming the trial court's refusal to admit certain evidence. However, *Gila* is merely an early articulation of the proposition that questions of admissibility of evidence are for the trial court, and such findings rarely will be disturbed on appeal. (Id.).

^{**} Thweatt's argument goes not to whether or not GX 56 should have been admitted into evidence, but rather to the weight which the jury should have accorded it. See Fed. R. Evid., Rule 104(e); *cf.*, *United States v. Arredo-Sarmiento*, 545 F.2d 785, 792 (2d Cir. 1976), *cert. denied*, 430 U.S. 917 (1977); *United States v. Amrep Corp.*, 560 F.2d 539, 547 (2d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3436 (Jan. 10, 1978), *United States v. Fuentes*, 563 F.2d 527, 531-33 (2d Cir. 1977).

to know that it is unlawful to submit to the Government reports inflating rental expenditures, when reimbursement for those expenditures is made in accordance with the amounts claimed on the reports. Nor does it require sophisticated knowledge of the law to know that it is unlawful to forge false and fraudulent rent receipts, and to filter money allegedly to be used for rent into personal bank accounts. Thus, as to Counts 1-19, rather than being "central" to the Government's case as Thweatt now contends, (Br. 28), GX 56 was, in fact, of minimal relevance.*

Finally, the minimal importance to the Government of GX 56 is highlighted by the fact that only one sentence in the prosecutor's entire summation even mentioned GX 56.** Indeed, contrary to the impression created in Thweatt's brief, trial counsel perceived GX 56 as a soft-spot in the Government's otherwise overwhelming case and exploited its admission by ridiculing the Government's supposed contention that the document made Thweatt aware of various reporting requirements. (Tr. 2282-84).

* The relevance of GX 56 was confined, almost exclusively to Counts 20-36, on which Counts no verdict was reached and the validity of which Counts therefore is not before this Court. On Counts 20-36, the Government did argue that Thweatt, violated a duty, of which he was aware, to report certain expenditures.

** In referring to the inter-company account transfers which were allegedly part of the scheme to conceal the expenditures charged in Counts 20-36 the prosecutor stated:

"Then, there is Government Exhibit 56 which is a letter that Mr. Oosdyk testified that he probably handed over to Mr. Thweatt which letter specifically says, follow various regulations." (Tr. 2255).

This was hardly an inflammatory use of GX 56.

POINT III**Thweatt's Fifth Amendment Rights Were Not Violated During The Imposition Of Sentence.**

Thweatt contends that he was penalized for exercising his Fifth Amendment rights when at sentencing Judge Ward indicated that he was taking into account Thweatt's "lack of contrition." Thweatt would have this Court believe that at his sentencing he asserted his Fifth Amendment rights and stood silent as to the facts of his case. In fact Thweatt never exercised his Fifth Amendment rights. Rather than remain silent Thweatt chose to make numerous voluntary statements both in open court and in a letter to Judge Ward regarding the facts of this case. Thweatt's affirmative statements demonstrated not only a lack of contrition, but defiance of both the law and the overwhelming evidence of his guilt. Judge Ward's consideration of Thweatt's "lack of contrition," as demonstrated by Thweatt's voluntary statements, was only one of many factors considered by the District Court in imposing sentence and involved no infringement of Thweatt's Fifth Amendment rights.

During the sentencing proceeding Judge Ward listened to a lengthy statement by defense counsel in mitigation of sentence. (Tr. Sent. 5-10). At no time did defense counsel suggest that Thweatt would not discuss the facts of the case because he believed that any such statement might prejudice his appeal or violate his rights against self-incrimination. Thereafter, Judge Ward invited Thweatt to make a statement in his own behalf or to present information in mitigation of punishment. Thweatt did not remain silent or merely make a formal denial of guilt. Instead, Thweatt volunteered "that I have never acted in an unauthorized fashion no matter whom I was working for", "that I unquestionably always tried to act in a proper manner and was open and honest as to what

I was doing in connection with others", and "I would never intentionally go about trying to break the law and I have not in the past." He claimed that others had signed the same documents he had signed, and that there were individuals from CJCC or Streetworkers who were aware of what had transpired. (Tr. Sent. 11-14).*

After listening to Thweatt and his attorney, Judge Ward imposed sentence. The careful and experienced District Judge ** stated at length his reasons for imposing sentence. He discussed the facts of the case, the money traced to Thweatt's bank account, the jury's verdict as a rejection of defendant's good faith defense, the seriousness of the offense, and several factors relating directly to Thweatt including the fact that he is a well educated man whose crime was not an "impulsive act of the moment." Judge Ward also referred to Thweatt's lack of contrition as well as other factors in mitigation and aggravation of sentence. (Tr. Sent. 20-27).

Since Thweatt had discussed the facts of the case in connection with his sentence and at no time indicated that his inability to exhibit some contrition involved constitutional values, Judge Ward did not err in considering as

* The fallacy in Thweatt's belated appellate claim that he was asserting his constitutional right to remain silent is vividly demonstrated by the seven page letter he wrote to Judge Ward in connection with his sentence. The letter presents several factual arguments which Thweatt undoubtedly believed exculpated him from the crimes for which a jury had convicted him. The letter further recklessly charges the prosecutors with coercing witnesses into refusing to cooperate with Thweatt's defense. There is not a scintilla of evidence to support this allegation, and such claim was never advanced by Thweatt's own attorney. (Tr. 2369).

** This Court recently praised Judge Ward's "highly commendable care and consideration" in a sentencing matter in another case where a defendant indicated "a total lack of contrition." *United States v. Ordner*, 554 F.2d 24, 30 (2d Cir.), cert. denied, 46 U.S.L.W. 3215 (Oct. 4, 1977).

one of many factors in imposing sentence the fact that Thweatt had not taken the "first step toward rehabilitation by recognizing he was at fault." *United States v. Floyd*, 496 F.2d 982, 989 (2d Cir.), *cert. denied*, 419 U.S. 1069 (1974). Indeed the reckless statements made by Thweatt in the letter he wrote to Judge Ward clearly demonstrate that Thweatt believed that everyone else but himself was to blame for his conviction. That letter and his statement at the time of sentencing are not evidence of a defendant asserting his Fifth Amendment rights, but rather reveal relevant information about the "character . . . of the man before (the sentencing judge)." *United States v. Doyle*, 348 F.2d 715, 721 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965). Thweatt's demonstrable defiance toward the law, *United States v. Hendrix*, 505 F.2d 1233, 1236 (2d Cir. 1974), *cert. denied*, 423 U.S. 897 (1975) revealed in part by his lack of contrition as well as the seriousness of his premeditated crime can be considered by the District Court in imposing sentence.*

Finally, the cases relied on by Thweatt are entirely different from what occurred in the instant case. *Poteet v. Fauver*, 517 F.2d 393 (3rd Cir. 1975); *Scott v. United States*, 419 F.2d 264 (D.C. Cir. 1969); and *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966). In these cases defendants were penalized for exercising their

* This Court has referred to numerous factors which a sentencing judge can consider when imposing sentence. See, *United States v. Ordner*, *supra*, 554 F.2d at 30; *United States v. Araujo*, 539 F.2d 287, 292 (2d Cir. 1976); *United States v. Seijo*, 537 F.2d 694, 699 (2d Cir. 1976); *United States v. Rosner*, 485 F.2d 1213 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974); *United States v. Sweig*, 454 F.2d 181, 184 (2d Cir. 1972). In light of the broad discretion given district judges in the types of factors they can consider in imposing sentence surely it is legitimate to consider a defendant's lack of contrition when that defendant does not stand mute or simply deny his guilt.

Fifth Amendment rights, as evidenced by the efforts of sentencing judges to induce or coerce confessions of guilt. In *United States v. Vermeulen*, 436 F.2d 72, 76 (2d Cir.), cert. denied, 402 U.S. 911 (1971), this Court recognized that *Scott* and *Thomas*

"both involved clear-cut attempts by sentencing courts to induce defendants who pleaded not guilty to confess their guilt of the crimes charged as a sign of repentance before sentence was announced."

The same can be said of *Poteet*.*

To accommodate the facts of the instant case with *Poteet*, *Scott*, and *Thomas*, Thweatt is forced to assert that Judge Ward "demanded in effect that he confess guilt prior to the imposition of sentence. . . ." (Br. 30). As we have demonstrated, nothing remotely approaching such a demand occurred at Thweatt's sentencing.

* In *Poteet v. Fauver*, *supra*, prior to sentencing the sentencing judge said in the presence of two defendants:

"You don't even admit your guilt . . .

I'm asking you. . . . I'm less interested in the Fifth Amendment. I'm interested in you were guilty of this crime [sic]. Your buddy; he says he wasn't. What do you say? I'm the man to impose the sentence. Not your buddy. You tell me. Were you there?" 517 F.2d at 394. One defendant confessed and received five years. The other persisted in his exculpatory story and received 14 to 16 years. Addressing the defendant who confessed the judge said:

"That saved you ten years."

Upon sentencing the other defendant, the Judge said:

"Until you learn to come clean with me, I don't have to give you any consideration . . ." 517 F.2d at 395.

Even Thweatt's extravagant claims do not suggest that Judge Ward's sentencing statement approached the situation in *Poteet*.

POINT IV

Thweatt's False Statements Were Made In A Matter Within The Jurisdiction Of A Department Or Agency Of The United States.

Thweatt urges reversal of his convictions because his false statements were not made in a "matter within the jurisdiction of any department or agency of the United States", within the meaning of 18 U.S.C. § 1001. In support of this contention Thweatt offers two arguments. First he argues that the Act's policy of avoiding federalization of local law enforcement agencies, the so-called "hands off" policy, precludes federal prosecution of fraud in the administration of LEAA funds and that this matter should accordingly have been prosecuted by local authorities. Thweatt also argues Section 1001 is inapplicable because his false statements were not made pursuant to federal requirements, but were made on reports of a strictly local nature. These arguments find no support in the applicable law or in the evidence.

Thweatt's first argument attempts to elevate the sound Congressional policy that LEAA not intrude into the daily operations of local law enforcement into a legislative intent to abrogate federal criminal sanctions against individuals such as Thweatt who attempt to cheat and defraud LEAA programs. The simple answer to Thweatt's extravagant claim, unsupported by any cases or legislative history, is that it confuses Congress' policy to use LEAA funds to encourage local law enforcement programs with Congress' equally clear interest in preventing fraud in the administration of LEAA funds.

Moreover, the statute creating LEAA obviously contemplates that the federal criminal law will be used to protect LEAA funds. The statute includes specific criminal sanctions, 42 U.S.C. §§ 3791, 3792, and the Act ex-

plicitly imposes certain record keeping requirements to which Streetworkers, Inc., was subject. 42 U.S.C. § 3769 (a) (b) and (c). The legislative history also refers expressly to the very statute under which Thweatt was prosecuted—18 U.S.C. § 1001:

“Thus, offenses involving funds or property in the hands of direct recipients from LEAA are punishable on the same basis as are offenses involving funds or property in the hands of grantees or subgrantees, contractors or subcontractors.

These criminal penalties have been added by the Committee out of an abundance of caution, since it seems clear that provisions of present law already cover some or all of these acts. See e.g., 18 U.S.C. Sec. 1001; 18 U.S.C., Sec. 371 . . .” *
(S. Rep. No. 1253, 91st Cong., 2nd Sess. (1970)
U.S. CODE CONG. & AD. NEWS 5804, 5832.)

In light of this clear expression of Congressional purpose and the sound policy of using the federal criminal law when individuals endeavor to deceive federally financed programs, Thweatt's argument must fail. See *United States v. Jones*, 464 F.2d 1118, 1122 (8th Cir. 1972), *cert. denied*, 409 U.S. 1111 (1973); *cf. Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971).**

* Of course, the enactment of specific statutes such as 42 U.S.C. §§ 3791, 3792 does not render inapplicable the general statute, even where the general one imposes a harsher penalty. See e.g. *United States v. Burnett*, 505 F.2d 815 (9th Cir. 1974), *cert. denied*, 420 U.S. 966 (1975); *United States v. Eisenmann*, 396 F.2d 565 (2d Cir. 1968).

** Indeed certain evidence presented at trial further established the federal government's power to audit the expenditure of LEAA funds and to investigate and prosecute fraud in the administration of LEAA funds. Such evidence demonstrated the fallacy in Thweatt's view that once the federal funds are disbursed, the federal government intended to take a “hands off” policy on

[Footnote continued on following page]

Thweatt's second argument is that the monthly cost reports containing his false statements were not made pursuant to federal requirements, but were strictly local in nature. In suggesting that false statements are not subject to Section 1001 unless made pursuant to a federal requirement defendant relies upon a misreading of *United States v. Candella*, 487 F.2d 1223 (2d Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). Contrary to defendant's suggestion, that case did not turn upon a finding that the false statements were made pursuant to federal regulations. (Br. 41). The statements were made on forms "prepared by the City and not by HUD", 487 F.2d at 1224, and apparently were not required by federal regulations. This Court held Section 1001 applicable because of the clear interest of HUD arising from its contractual relationship with the City and the fact that HUD's interest in the matter was made "abundantly clear" to the defendants. 487 F.2d at 1226.

Indeed this Court's opinion in *United States v. Candella* clearly supports the view that these monthly reports are matters within the jurisdiction of the federal govern-

whether those funds are used properly. The evidence established that LEAA granted funds to the State of New York after reviewing and approving New York State's Comprehensive Crime Control Plan. (Tr. 360-61). LEAA required New York State to submit quarterly disbursement and expenditure reports, which included specific reference to the Legal Propinquity Program, and required New York State to "maintain records showing the control, maintenance and utilization of the funds that we [LEAA] [gave] them on a program basis." (Tr. 363). Indeed the information contained in the monthly cost reports submitted by Streetworkers was incorporated into the New York State reports to LEAA. (Tr. 303; GX 100-107, 115-16).

Moreover, at the user level, LEAA funds were required to be expended properly; and, under Bureau of the Budget Circular No. A-87, issued on May 9, 1968, expenditures were required to be reasonable and necessary to the program. (Tr. 364-65).

ment. As with the defendants in *Candella*, Thweatt's awareness of LEAA's involvement and continuing interest in the funds which he was embezzling and about which he was making false statements cannot be seriously questioned. The grant award (GX 28), "whose provisions shall govern the administration of and accountability for all funds disbursed", and the subcontract (GX 30) between CJCC and Streetworkers, are permeated with references making clear LEAA's interest and involvement in the expenditure and reporting of LEAA funds. The grant award states that the grant is awarded under a federally sponsored program pursuant to the Act, that the State has ultimate responsibility and is accountable to LEAA for proper administration of the funds, that the grantee shall keep accurate books and records, that the books and records shall be accessible to authorized representatives of the federal government for purposes of examination and audit, that expenditures will be disallowed if not in compliance with Bureau of the Budget Circular No. A-87, and that any income derived from grant funds shall inure to the benefit of the United States. Both the grant award and the subcontract between CJCC and Streetworkers included a budget which clearly demarked "Federal Funds" and "Matching Funds".

The monthly cost reports, some of which were prepared by Thweatt and the remainder of which he caused to be prepared, also reflected a clear demarcation of federal funds. Finally, in a letter dated August 13, 1973 (GX 33), under Thweatt's signature, Streetworkers applied for "federal funds" to extend the term of the grant pending application for a long term refunding.*

* These facts distinguish the instant case from *Lowe v. United States*, 141 F.2d 1005 (5th Cir. 1944), the only case cited by defendant where Section 1001 was held inapplicable. In *Lowe* the

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Furthermore, Thweatt's argument virtually ignores the basic purpose of Section 1001—to protect authorized government functions from the frustration or perversion that might result from deceptive practices. *United States v. Adler*, 380 F.2d 917, 921-22 (2d Cir. 1967); *United States v. Gilliland*, 312 U.S. 86, 93 (1940); *Ogden v. United States*, 303 F.2d 724, 742-43 (9th Cir. 1962). Section 1001 has been held applicable to false statements which relate to a matter as to which the department or agency has “the power to act”, *Ogden v. United States*, 303 F.2d at 743, or where, as this Court recognized in *Candella*, it is “contemplated” that the statement is to be utilized in a matter within the jurisdiction of a department or agency. *United States v. Candella*, *supra*, 487 F.2d at 1227. See also *Ebeling v. United States*, 248 F.2d 429, 434 (8th Cir.), *cert. denied*, 355 U.S. 907 (1957).

Not only was Thweatt clearly aware of the federal government's interest in the funds used by Streetworkers, but the provisions of the Act regarding record keeping and criminal penalties, and the contractual relationships among the State, the City and Streetworkers clearly gave LEAA the “power to act” in regard to Thweatt's false statements. Most significantly no serious argument can be made that Thweatt's false statements did not frustrate the lawful functions of LEAA to audit the expenditure

defendant apparently had no awareness of the federal government's interest. The Fifth Circuit stated, at 1006:

Insofar as the employee was concerned, every aspect of his employment was exactly the same as it would have been had there been no contract with any governmental agency of any kind.

Thweatt cannot make a similar claim. His false statements were made in “contemplation” of their being utilized in a matter within the jurisdiction of LEAA. *United States v. Candella*, *supra*, 487 F.2d at 1227.

of LEAA funds. See *United States v. Adler, supra*; *Ogden v. United States, supra*. Accordingly, Thweatt's false statements were made in a matter within the jurisdiction of LEAA.

POINT V

Judge Ward Did Not Abuse His Discretion In Refusing To Delay The Commencement Of The Trial.

Thweatt claims that Judge Ward committed reversible error by denying a morning of trial request for an adjournment, even though the trial date had been set over five weeks earlier. (Br. 44). This contention is without merit.

On July 28, 1977, the Indictment was filed; and Thweatt was arraigned on August 4, 1977. On August 22, 1977, the Court held a pre-trial conference at which time the Court advised Thweatt that he was a part of the Pilot Project under the Speedy Trial Act, which required that trial commence within 60 days of arraignment, (Tr. of Aug. 22, 1977 at pp. 3, 9), that the Court originally wished to set the trial down in late August, (*Id.* at pp. 2-3, 5), and that a firm trial date of September 26, 1977 would be set. (*Id.* at p. 22). Thweatt stated that he had contacted, but not as yet retained, a lawyer named Carl Bernstein, who would be returning on September 8, 1977, and requested, "the first part of October for the trial date". (*Id.* at p. 16, 14, 22).

Judge Ward advised Thweatt that in selecting counsel he should be aware of the fact that the September 26 trial date was firm, and that if he had difficulty retaining counsel the Court would appoint counsel. (*Id.* at p. 21). The Court observed both because of the Speedy Trial Act, and other scheduled matters, that September 26, 1977 was the latest date which he could set consistent with his other obligations. (*Id.* at pp. 21-23).

On September 15, 1977, eleven days prior to trial, Judge Ward held another pretrial conference, at which Carl Bernstein appeared on behalf of the defendant. (Tr. of Sept. 15, 1977). Judge Ward reiterated that the trial date was firm, that it had been set on August 22, 1977 and that if counsel devoted himself to the task, the case would be adequately prepared. (*Id.* at pp. 10-11).*

On the morning of September 26, 1977, the very morning of trial, trial counsel made an eleventh hour request for a week adjournment. (Tr. 3-4). The linchpin of his request for an adjournment was apparently the claimed need to prepare for Counts 20-36. Indeed, trial counsel specifically stated:

"I would agree that the first 19 Counts are not particularly difficult, conceptually, to deal with. If the government chooses to dismiss the remaining counts, through Count 36, the embezzlement count, I would have no objection to that. I would then change my mind and mark it ready to proceed." (Tr. 18). (Emphasis supplied.)

Judge Ward denied the application for adjournment. He observed that the defendant would not have to present its case for over two weeks and emphasized that as the trial progressed, he would be "alert to applications by defense counsel for continuances for particular purposes". (Tr. 25, 29-30).

The decision whether or not to grant a continuance is one traditionally entrusted to the sound discretion of the trial judge; the only requirement is that the decision be reasonable. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964); *United States v. Rastelli*, 551 F.2d 902, 905-06 (2d Cir.),

* Mr. Bernstein never indicated to the Court that he could not be ready, he merely stated, "I think it would be very difficult for me to adequately prepare." (*Id.* at p. 10).

cert. denied, 46 U.S.L.W. 3216 (Oct. 4, 1977); *United States v. Lewis*, 565 F.2d 1248, 1252-53 (2d Cir. 1977); *United States v. Carroll*, 510 F.2d 507, 510 (2d Cir. 1975), *cert. denied*, 426 U.S. 923 (1976); *United States v. Hall*, 448 F.2d 114, 116 (2d Cir. 1971), *cert. denied*, 405 U.S. 935 (1972); *United States v. Ellenbogen*, 365 F.2d 982, 985 (2d Cir. 1966), *cert. denied*, 386 U.S. 923 (1967).

In view of Judge Ward's obligations under the pilot program and the Speedy Trial Act and Plan, his decision to commence the trial on September 26 was reasonable and clearly not an abuse of discretion. Thweatt was advised of the trial date over three weeks after the filing of the Indictment and over five weeks in advance of the actual date set. Eleven days prior to trial, counsel did not represent to the Court that he could not be ready, only that, "I think it would be very difficult for me to prepare". (Tr. of September 15, 1977 at p. 10). See *United States v. Lewis*, *supra*. Even on the morning of trial, counsel conceded that he was ready to proceed on Counts 1-19, the only counts before this Court on appeal, and that any time problem which he had pertained to the remaining counts. (Tr. 18).

Moreover, contrary to Thweatt's appellate claims (Br. 47), he has suffered no prejudice from the denial of the continuance. See *United States v. Carroll*, *supra*, 510 F.2d at 511; See also, *United States v. Lustig*, 555 F.2d 737, 744 (9th Cir.), *cert. denied*, 46 U.S.L.W. 3293 (Nov. 1, 1977). There is no claim on appeal that trial counsel's representation was inadequate, see, *United States v. Carroll*, *supra*, 510 F.2d at 511, and a brief review of the factors relied on by trial counsel to obtain the continuance demonstrates that Thweatt's claims of prejudice are meritless.

At the time of his application, trial counsel relied primarily on three grounds (1) the need to consult with

a handwriting expert, (2) the need to consult with an accounting expert and (3) a need to consult with five witnesses. (Tr. 3-4). In each instance, the record reveals that the defendant suffered not even the slightest prejudice. The report of the handwriting expert had been provided to Mr. Bernstein approximately ten days prior to trial, (Tr. 7), and the Government's handwriting expert did not testify until October 10, 1977, nearly three weeks into the trial. (Tr. 1541). Not only did counsel have an opportunity to confer with an accountant, but he was assisted at counsel table by an accountant during the testimony of Charles Gomez, a certified public accountant called by the Government. (Tr. 1390). Finally, as to the five witnesses, counsel stated that he wished to interview, two, Charles Gomez and Richard Schwarzstein actually testified at trial. (Tr. 956-990, 1392-1493). Another Susan Whitaker was advised that although she had been subpoenaed by the Government, her subpoena would apply equally should the defendant choose to call her (Tr. 1221). A fourth witness, Ruby Wright actually conferred with Thweatt's counsel, but was ultimately not called as a witness (Tr. 2118-21, 2369). With respect to the fifth individual, Burt Hoff, the government specifically provided counsel with his telephone number (Tr. 6-7, 1223). There is not the slightest suggestion in the record that the decision to call or not call these witnesses was anything but a matter of sound trial tactics. Significantly, at no time did trial counsel take advantage of Judge Ward's invitation to seek a continuance in order to secure additional witnesses or to prepare for the questioning of other witnesses.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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